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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. [redacted] 3

THE TIMES-MIRROR COMPANY, a corporation, and L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SUBJECT INDEX.

PAGE

Preliminary statement 1

Petitioners were not summarily or arbitrarily tried or convicted 1

A virtual confession of guilt on one count 5

Renewal of claim that freedom of press is an absolute right 7

Pending court causes have been excluded from the field for unrestrained speech 9

I.

Editorials in question were contemptuous according to suggested standard 12

Editorials viewed as a whole 12

"Sit-strikers" convicted 16

Petitioners' attempted defense of this editorial 20

Probation for gorillas 21

Petitioners' attempted defense 24

The fall of an ex-queen 26

II.

The instant petition presents no federal question 31

What constitutes contempt is a matter of local law 31

Application of Fourteenth Amendment to contempt 34

Patterson v. Colorado is controlling 35

Finality of contempt judgment is essential to independence of contemned court 37

PAGE

III.

The "clear and present danger" doctrine is not applicable to contempt 37

There is a manifest distinction between abridging free speech and punishing its abuse 39

The clear and present danger doctrine was not designed for application to contempt 40

The true purport of the doctrine 42

The doctrine, as advanced by petitioners, is not essentially different from the reasonable tendency rule 42

Either doctrine presents a mere question of fact 44

Herndon v. Lowry does not support petitioners' position 48

Reasonable tendency is a common law standard, not a newly created criterion of guilt 49

The "actual obstruction" principle 53

Conclusion 57

TABLE OF AUTHORITIES CITED.

CASES. **PAGE**

Allen v. Indus. Acc. Com., 3 Cal. (2d) 214 15
Associated Press v. National Labor Relations Board, 301 U. S. 103 ..... 9, 41
Barreiro, Estate of, 125 Cal. App. 752 15
Bell Telephone Co. v. Pennsylvania P. U. Commission, 84 L. Ed. (Adv. Op.) 412 35
Blackmer v. United States, 284 U. S. 421 34
Blythe, In re, 108 Cal. 124 15
Borden's Farm Products Co. v. Baldwin, 293 U. S. 194 15
Cantwell v. Connecticut (No. 632, decided May 20, 1940) 39, 49
Carlson v. State of California, 84 L. Ed. (Adv. Op.) 671 ..... 10, 39
Cincinnati Street Railway Co. v. Snell, 193 U. S. 30 33
City of Los Angeles v. Abbott, 217 Cal. 184 15
Cline v. Frink Dairy Co., 274 U. S. 445 50
Cooke v. United States, 267 U. S. 517 34
Craig v. Hecht, 263 U. S. 255 44
Daily v. Superior Court, 4 Cal. App. (2d) 127 47
Debs, re, 158 U. S. 564 38
Eilenbecker v. District Court, 134 U. S. 31 34
Erie R. Co. v. Tompkins, 304 U. S. 64 ..... 32, 33
Fisk, Ex parte, 113 U. S. 713 37
Fox v. Washington, 236 U. S. 273 52
Gasquet v. Lapeyre, 242 U. S. 367 36
Gay v. Gay, 146 Cal. 237 15
Gitlow v. New York, 268 U. S. 666 ..... 8, 39, 40, 42
Grosjean v. Amer. Press Co., 297 U. S. 233 39
Hallinan, In re, 126 Cal. App. 121 47
Herndon v. Lowry, 301 U. S. 242 ..... 39, 48

PAGE

Hollenbach v. Schnabel, 101 Cal. 312 15
International Harvester Co. v. Kentucky, 234 U. S. 216 ..... 50, 51
Kearney, Ex parte, 7 Wheat. 38 37
KVOS v. Associated Press, 13 Fed. Supp. 910 8
Lindsley, In re, 75 Cal. App. 122 31
Lindsley v. Superior Court, 76 Cal. App. 419 ..... 31, 47
Lovell v. Griffin, 303 U. S. 444 39
Michaelson v. United States, 266 U. S. 42 34
Milwaukeee, etc. Co. v. Wisconsin ex rel. Milwaukee, 252 U. S. 106 ..... 34, 35
Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 84 L. Ed. (Adv. Op.) 477 ..... 20, 25, 52
Missouri v. Lewis, 101 U. S. 22 ..... 32, 33
Myers v. United States, 264 U. S. 95 34
Nash v. United States, 229 U. S. 373 49
National Labor Relations Board v. Fansteel Met. Corp., 306 U. S. 240 18
Near v. State of Minnesota, 283 U. S. 697 ..... 8, 10, 31, 39
Newport Light Co. v. City of Newport, 151 U. S. 527 36
Nixon v. State, 207 Ind. 426 53
Owen v. Dancy, 36 Fed. (2d) 882 36
Patterson v. Colorado, 205 U. S. 454 ..... 2, 11, 35, 37
People v. Busick, 32 Cal. App. (2d) 315 4
People v. Shannon, 28 Cal. App. (2d) 677 ..... 4, 23
People v. Werner, 29 Cal. App. (2d) 126 ..... 4, 14, 15, 27
People v. Wilson, 64 Ill. 195 55
Plaquemines Tropical Fruit Co. v. Henderson, 170 U. S. 511 33
Powell v. Pennsylvania, 127 U. S. 678 33
Rapier, Ex parte, 143 U. S. 110 8
Reilly, In re, 17 Cal. App. (2d) 55 47

PAGE

Riley v. Worcester County Trust Co., 89 Fed. (2d) 59..... 34
Robinson, Ex parte, 86 U. S. 505..... 34
Rockford Produce & Sales Co., In re, 275 Fed. 813..... 2
Rose v. Superior Court, 140 Cal. App. 418..... 47
San Francisco Chronicle, In re, 1 Cal. (2d) 630.....31, 47, 55
Savin, Ex parte, 131 U. S. 267..... 34
Schaefer v. United States, 251 U. S. 474.....44, 48
Schenck v. United States, 249 U. S. 52.....39, 40, 45, 55
Schneider v. New Jersey, 308 U. S. 147..... 39
Schomer v. R. L. Craig Co., 137 Cal. App. 620..... 15
Sewell v. Johnson, 165 Cal. 762..... 15
Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57..... 33
Shortridge, In re, 99 Cal. 535..... 8
Shuler, In re, 210 Cal. 377.....31, 47
Sinclair v. United States, 279 U. S. 749.....31, 40, 55
State v. American News Company, 64 S. D. 385..... 53
Thornhill v. Alabama, 84 L. Ed. (Adv. Op.) 659.....9, 39
Toledo Newspaper Company case, 247 U. S. 419.....
.....11, 31, 40, 41, 43, 47, 53, 55
Truax v. Corrigan, 257 U. S. 372.....32, 33
Tumey v. State of Ohio, 273 U. S. 510.....33, 34
United States v. L. Cohen Grocery Co., 255 U. S. 81..... 49
United States v. Moore, 287 Fed. 879, certiorari denied 264 U. S. 581..... 34
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86..... 49
Whitney v. California, 274 U. S. 373.....39, 40, 45, 46
Wood v. Kennedy, 117 Cal. App. 53..... 15

STATUTES. PAGE

California Constitution, Sec. 9, Art. I 31
Penal Code, Sec. 17 23
Penal Code, Sec. 182 23
Penal Code, Sec. 245 23
Penal Code, Sec. 484 26
Penal Code, Sec. 487 26
Penal Code, Sec. 489 26
Penal Code, Sec. 653d 27
Penal Code, Sec. 653f 26, 27
Penal Code, Sec. 664 26
Penal Code, Sec. 1203 ..... 24, 25
Penal Code, Sec. 1204 25

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THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

Petitioners Were Not Summarily or Arbitrarily Tried or Convicted.

Petitioners would convey the impression that they have been "summarily laid by the heels" (Pet. pp. 18-19) in a proceeding so "summary" (pp. 14, 18) as to deprive them of substantial rights. If they use the phrase "summary proceeding" in the sense of trial without a jury, the record discloses that no demand for jury was made and, hence, no grievance suffered in that respect. The court,

in *In re Rockford Produce & Sales Co.*, 275 Fed. at 813, said:

> "A summary proceeding ordinarily implies one begun without summons or subpoena, and is usually tried upon affidavits and upon short notice, or determined even as an *ex parte* matter."

If this is the sense in which petitioners use the word "summary", the record clearly refutes their contention. Apparently they are attempting to bring themselves within the "arbitrary pretense" test of Mr. Justice Holmes, who said in *Patterson v. Colorado*, 205 U. S. 454, 460:

> "It is argued that the articles did not constitute a contempt. * * * However, it is enough for us to say that they are far from showing that innocent conduct has been laid hold of *as an arbitrary pretense for an arbitrary punishment.*[1] Supposing that such a case would give the plaintiff in error a standing here, *anything short of that is for the state court to decide. What constitutes contempt, as well as the time during which it may be committed, is a matter of local law.*"

But the record shows that the proceeding was free of all the characteristics of summariness or arbitrariness. It commenced on June 3, *1938* [R. 26], and ended on February 29, *1940* [R. 149].

It was initiated by the Los Angeles Bar Association [R. 1, 5], whose Executive Secretary made affidavit charging five separate contempts [R. 9-25]. An order to show cause was issued on June 3, 1938 [R. 25]. Immediately thereafter, on June 5th and 7th, the Los Angeles

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[1]All italics ours, unless otherwise indicated.

Times published two editorials entitled "A Black Committee Here?" and "Curious Reasoning", the first of which was thus described by the trial judge:

> "Generally it is a criticism of the committee for having commenced the first proceeding. Their act is referred to as 'an effort to set up a sort of a local Black Committee of press censorship'," [R. 116.]

and the second:

> "This editorial, like the last, consists of a statement of the facts from the standpoint of the respondents and an argument upon the law relating to their previous citation for contempt." [R. 117.]

A second contempt proceeding having been commenced for the publication of these editorials, both matters thereafter progressed simultaneously. They were transferred to a department other than that of the judge who issued the order [R. 2, 26, 89]. Demurrer was filed by petitioners herein on June 28th [R. 4]. It was argued for a period of *seven* days, July 6th-14th [R. 90-93].

As counsel for petitioners later phrased it, "We argued here at great length and had ample opportunity to present and the court heard us with far more than ordinary patience and what appeared to me to be with more than ordinary attention" [R. 86].

The court, on August 18th, sustained the demurrer without leave to amend as to the second and fourth counts of the instant proceeding and overruled it as to the other counts [R. 94]. At the same time the judge, Honorable Emmet H. Wilson, rendered an exhaustive and conspicuously able opinion [R. 95-118]. Thereupon petitioners filed answers [R. 5] and the matter was tried upon the issues thus raised [R. 94]. It was not presented on

affidavits or handled summarily; it was tried upon oral evidence in the same manner as any ordinary civil or criminal case [R. 66-88]. Petitioner Hotchkiss testified in his own behalf [R. 84], as did the general manager of the corporate petitioner [R. 82]. At the conclusion of the hearing counsel for petitioners said:

> "We have read the decision of the court with much interest and I dare say with some considerable instruction and we appreciate that it represents on Your Honor's part, as our efforts represented on our part, your very best efforts after hearing both sides of this matter and after giving the matter your mature, conscientious consideration, and we respect your opinion as such. We make this statement not only out of appreciation for the courteous consideration which we have been shown here, but the straightforward and convincing manner in which Your Honor has handled it." [R. 86.]

This immediately preceded petitioners' conviction upon the three remaining counts[1] [R. 88] and upon the two counts of the second proceeding [R. 88]. Judgment was rendered on August 31st [R. 61].

Certiorari was granted in both cases by the California Supreme Court [R. 62]: the two cases were presented upon a consolidated record [R. 64] and orally argued and submitted on December 7, *1938* [R. 119]. That submission was set aside and on November 2, *1939*, the cause was

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[1]None of the cases mentioned in these counts was pending before the judge who issued the order to show cause or the judge who heard the contempt proceeding. This appears from the official reports of *People v. Busick*, 32 Cal. App. (2d) 315; *People v. Werner*, 29 Cal. App. (2d) 126; and *People v. Shannon*, 28 Cal. App. (2d) 677.

reargued and resubmitted [R. 119]. And the matter was elaborately briefed. Petitioners filed an opening brief of 242 pages, a reply brief of 46 pages, and a supplemental brief (filed at the time of the second argument) comprising 49 pages. The cause was decided two months after the reargument, on January 31, 1940 [R. 120]. Petition for rehearing was denied on February 29th [R. 149], and petitioners given three months to prepare and present their record in this court [R. 150].

The measured and temperate opinions of Judge Wilson and the Supreme Court show that both tribunals accorded petitioners fullest opportunity to defend and arrived at the conclusion that they had abused their acknowledged right of free speech only after a painstaking review of the facts and the applicable law. No better proof of this could be found than the remarks of counsel for petitioners made in the trial court [R. 86], which we have already quoted.

A Virtual Confession of Guilt on One Count.

And as to the merits Mr. Cosgrove, who represents petitioners here, made a statement which was tantamount to an admission of guilt on one count—which will indeed bear no other rational construction. He said [R. 87]:

> "* * * I honestly and sincerely believed and, with great deference to the court, I still honestly believe that *with the possible exception of one of these editorials* that they did not commit a contempt of court, but at the same time that like any other matter that is contested in the court is one in which counsel may have honest differences of opinion."

This admission doubtless referred to "Probation for Gorillas?" [R. 23], which, after castigating the defendants in the pending criminal action, shook the publisher's finger under the judge's nose and, calling him by name, said:

> "It will teach no lesson to other thugs to put these men on good behavior for a limited time. Their 'duty' would simply be taken over by others like them. If Beck's thugs, however, are made to realize that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shan..on and Kennan Holmes. This community needs the example of their assignment to the jute mill." [R. 23-24.]

The Supreme Court said:

> "But little is said, or can be said, in defense of the publication of this editorial" [R. 131],

and that:

> "* * * petitioner, The Times-Mirror Company, advances no serious defense of its publication of said editorial in so far as the character and nature of the editorial are involved * * *." [R. 131.]

The attempt to raise a constitutional question under these circumstances seems to lend color to the remarks of Mr. Wirin's *amicus curiae* brief:

> "For fifty years it (The Times) has had much to say in its editorial columns upon many public

issues. Not once, however, has it ever raised its voice in defense of freedom of speech for anyone other than for itself and for those in its, and its publisher's economic class. When Yetta Stromberg, California radical; Angelo Herndon, young communist; Amy Lovell, religious fanatic, and Kim Young, Los Angeles student, asserted that they had been deprived of freedom of speech, the 'Times' maintained a studied silence. Now that its own freedom is affected it protests stoutly that its freedom of speech has been abridged by its conviction for contempt of court." (pp. 2-3.)

Renewal of Claim That Freedom of Press Is an Absolute Right.

The American Newspaper Publishers Association in its *amicus curiae* brief asserts that "Probation for Gorilias?" "is a proper exercise of the function of the press in presenting views on a vital public issue in the field of criminal law enforcement where complaints about ill-advised clemency are frequently expressed" (p. 9). It doubtless takes this position because of its conception (p. 3) that the Federal Constitution prohibits "every conceivable form of abridgment of freedom of the press. *Any restraint from any source and by any method* was considered repugnant to the constitutional guarantee" (p. 3; italics by author).

Were it not for the endorsement of "Probation for Gorillas?", we would assume that this language connoted freedom of speech (or press) in the qualified sense which

is wellnigh universally recognized and is thus phrased in *In re Shortridge*, 99 Cal. at 535:

> "Liberty of the press must not be confounded with mere license. Liberty of the press stops where a further exercise would invade the rights of others."

Or, as Judge Wilson phrased it:

> "Reasonably limited this freedom is an inestimable privilege in a free government, but without limitation it might become a scourge to state or nation."[1] [R. 98.]

But the Association's endorsement of this address to the judge upon a pending matter leaves no escape from the conclusion that it deliberately advocates newspaper exemption from "any restraint from any source or by any method".

The extreme doctrine now advocated by the *amicus curiae* is but a revival of a series of unsuccessful attempts to push a recognized liberty beyond reasonable bounds. Though the principle had been announced in *Near v. State of Minnesota*, 283 U. S. 697, 715, it was necessary for the court to decide as late as 1936 that the constitutional guarantee does not afford immunity from liability for libel (*KVOS v. Associated Press*, 13 Fed. Supp. 910, 912). This same liberty has had to yield to a prohibition of use of the mails in furtherance of lotteries (*Ex parte Rapier*, 143 U. S. 110). The effort of the newspapers to exempt themselves from the application to their editorial staffs of the National Labor Relations Act

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[1]See *Gitlow v. New York*, 268 U. S. at 667.

met with this response in *Associated Press v. National Labor Relations Board,* 301 U. S. at 131-33:

> "Does this statute, as applied to the petitioner, abridge the freedom of speech or of the press safeguarded by the First Amendment? We hold that it does not. * * * The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court."

It is indisputably established (indeed, *petitioners* concede the fact) that freedom of speech or of the press does not immunize conduct which constitutes contempt of court according to recognized standards. Petitioners merely inveigh against the established criterion—reasonable tendency to influence or interfere with the deliberations of the court.

Pending Court Causes Have Been Excluded From the Field for Unrestrained Speech.

Contrasted with the claim of the Publishers Association that it is not meet that judges stand "aloof from the democratic check of public opinion" concerning pending causes (p. 4) is the recent limitation to political and economic matters of the permissible field of free speech. *Thornhill v. Alabama,* 84 L. Ed. (Adv. Op.) 659, 662:

> "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread

> *political and economic truth.* Noxious doctrines *in those fields* may be refuted and their evil averted by the courageous exercise of the right of free discussion."

This language, read with *Near v. Minnesota* (cited with approval at p. 663), appears to have been carefully designed to exclude any trespass of free speech upon the domain of court independence, which (to borrow the language of *Carlson v. State of California*, 84 L. Ed. (Adv. Op.) at 671) "falls within the allowable area of state control". The *Near* case,[1] it will be recalled, says:

> "But it is recognized that punishment for the *abuse* of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. *Id.* pp. 883, 884. The law of criminal libel rests upon that secure foundation. *There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions.* Patterson v. Colorado, 205 U. S. 454, 51 L. Ed. 879, 27 S. Ct. 556, 10 Ann. Cas. 689; Toledo Newspaper Co. v. United States, 247 U. S. 402, 419, 62 L. Ed. 1186, 1193, 38 S. Ct. 560."

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[1]283 U. S. at 715.

Plainly the reason for this exclusion of pending court proceedings from the aegis of free speech is correctly stated by Mr. Justice Holmes in *Patterson v. Colorado*, 205 U. S. at 462:

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. What is true with reference to a jury is true also with respect to a court."

And the matter is further explained by Judge Wilson, at R. 104, as follows:

> "The judicial department of the government is not on a parity with its coordinate branches. The legislator and the executive may receive petitions and advice from their constituents, they may express their opinions upon any subject at any time, yet they are not disqualified from acting. This freedom is forbidden ground to the judge. To learn any facts concerning a case, to discuss its merits, to hear any argument except in open court, or to express an opinion before hearing the evidence, is to disqualify him. Neither may he go upon the public rostrum, give interviews to the newspapers, or circularize the public, in explanation or in defense of his judicial acts. The reason for his decisions must appear from the decisions themselves."

The claim that public interest endues the publisher with immunity from such trespasses upon the court's exclusive domain was definitely refuted by the decision in the *Toledo Newspaper Company* case, 247 U. S. at 419-20.

I.

Editorials in Question Were Contemptuous According to Any Suggested Standard.

The sterile nature of petitioners' claim of denial of constitutional rights becomes immediately manifest, without necessity of legal refinement of definition of adequate tests, when the true nature of each editorial is understood.

The Publishers Association asserts in its brief that "Regardless of what test is applied, the editorials are clearly within the limits of permissible comment and criticism" (p. 7). On the other hand, we are equally positive that they are contemptuous regardless of the test applied to them.

Although we stand upon the rule that "What constitutes contempt, as well as the time during which it may be committed, is a matter of local law,"[1] nevertheless a brief review of the editorials upon which conviction was based will disclose beyond a peradventure that there is no federal question here.

Editorials Viewed as a Whole.

The Supreme Court, summarizing as to the three editorials, concluded:

> "In the present case the detriment caused by the publication of said editorials was the *probable denial of a fair trial* to the litigants in the actions then pending before the courts which were the subject of said editorials." [R. 138.]

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[1]See Point II hereof.

The first and fifth counts [R. 9, 22] relate to prosecutions of labor representatives. An affidavit of Harry Chandler, president of the corporate petitioner, was received as evidence at the trial by consent [R. 80]. Mr. Chandler said:

> "With the editorial policy of the Los Angeles Times I have been intimately familiar and have contributed greatly to the shaping of said policies during the past approximately thirty years.
>
> "For approximately fifty years the Los Angeles Times has been the principal newspaper exponent in the United States of the open shop system of industrial relations." [R. 42-43.]

Mr. Chandler further says that, in advocacy of its "open shop" industrial policy, the Times "has done *everything in its power* to establish and maintain the open shop principle" [R. 44]; that it has "resisted to the extent of its ability * * * attempts to establish within *its sphere of influence* conditions inimical to that policy" [R. 44]. Its "vigor and determination" in "its opposition to everything hostile thereto have made it a leader of community thought and action" in these matters, so he avers [R. 44], and this has become true to such an extent that "The Times believes itself to be qualified to give an informed opinion on matters such as that involved in the probation matter above mentioned" [R. 52]. And the expression of such opinions (so that they will reach the court[1]) serves "what it conceives to be the best interests of this community" [R. 52].

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[1]That the editorial was actually intended for the court also appears from the discussion at page 12 of petitioners' brief.

And so, although the Times has continuously kept the public *factually* informed on these matters [R. 45, 47, 50], it concludes that that is not enough when the C. I. O. "sit-strikers" are to be sentenced and the "goon squad" defendants are perhaps to be shown leniency by way of probation; it feels itself "privileged and expected to speak" for "the community" [R. 44]. To whom? The judge, of course. The facts have been repeatedly laid before the public, and so the conclusions advanced in the editorials can be intended only as a direct address to the judge or for the purpose of fomenting public opinion so that it will be brought to bear upon his expected decision. In one instance, the judge was addressed by name: "Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes" [R. 24]. Indeed, Mr. Hanson contends (p. 8) that the newspaper function in these matters is "as a molder of community opinion," with the obvious objective that the judge shall not remain "aloof from the democratic check of public opinion" (p. 4).

This well-known policy of the Times dovetails into its "doing everything in its power" [R. 44], political or otherwise, to accomplish its end of defeating the closed shop policy "within its sphere of influence". Its enormous political power was as well known to itself as to the judges of the Los Angeles Superior Court, and was judicially noticed by the Supreme Court [R. 128]. These editorials were directed to an elective judiciary and one of them to its youngest and newest judge, A. A. Scott, whose appointive term of office would soon expire.

In the *Werner* case [R. 16] the trial judge disclosed that he had given consideration to newspaper articles. The record (of which Judge Wilson, the California Su-

preme Court and this court may properly take judicial notice[1]) shows that upon the hearing of the motion for new trial, counsel for defendants inquired "whether, if application for probation were made, it could do other than delay the passing of sentence?" The judge responded, in part, as follows:

> "The theory upon which probation is granted is one of rehabilitation, and where defendants are in the frame of mind that these defendants undoubtedly are, where I believe—*if certain things which I have read in the public press are, perhaps, true*—they go even further than that and feel that they have had an unjust trial, that there has been a miscarriage of justice, that they have not been dealt with fairly at all, naturally there is no ground there upon which there could be a meeting of the minds, Mr. D'Orr." [4 Crim. No. 436, Tr. pp. 862-3.]

This case was reversed (*People v. Werner*, 29 Cal. App. (2d) 126). Who can say what was the quantum of error which the newspaper contributed to the ruling denying the motion for new trial? But amount of contribution is immaterial; the fact is all important. If news items thus wrought influence upon the judicial mind, what about editorials pointing out the Times' lay opinion as to the proper judicial ruling?

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[1]*Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 209; *City of Los Angeles v. Abbott*, 217 Cal. 184, 192, 193; *Wood v. Kennedy*, 117 Cal. App. 53, 60-61; *Estate of Barreiro*, 125 Cal. App. 752, 754; *Hollenbach v. Schnabel*, 101 Cal. 312, 315-16; *Schomer v. R. L. Craig Co.*, 137 Cal. App. 620, 627; *In re Blythe*, 108 Cal. 124, 126; *Scovell v. Johnson*, 165 Cal. 762, 768; *Gay v. Gay*, 146 Cal. 237, 241; *Allen v. Indus. Acc. Com.*, 3 Cal. (2d) 214, 215.

"Sit-Strikers Convicted".

On December 20, 1937, twenty-two "sit-strikers," including Busick and Schmolder, "CIO organizers and ringleaders of the strike"[1] [R. 47], were convicted of a conspiracy to violate sections 418 and 594 of the Penal Code [R. 10], which respectively define the crimes of forcible detainer of the premises of another and malicious destruction of property. Each of these crimes is defined as a misdemeanor, but section 182, Penal Code, makes it optional with the court in its discretion to treat the offense as a misdemeanor or a felony, and section 17 provides that in case the court imposes a fine or a county jail sentence the crime shall thereafter be deemed a misdemeanor for all purposes.

On said 20th day of December, Judge Ambrose, the trial judge, fixed December 22nd as the date for sentence [R. 10]. That date automatically became the time for hearing a motion for new trial (Pen. C., Secs. 1200-1201), or for probation, if such an application was meantime permitted (Pen. C., Sec. 1203). Also it would become necessary, upon sentencing the defendants, to determine whether they should be treated as felons or merely misdemeanants. The editorial "Sit-Strikers Convicted" immediately preceded a ruling upon all of these matters, some of which were necessarily presented for determination at time of sentence, and others of which would in all probability be likewise presented.

Presumably three hundred and ninety-four "sit-strikers" had been indicted [R. 46], and all but twenty-two of them had been exonerated by Judge Bishop [R. 47].

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[1]Chandler affidavit.

Upon their first trial the jury disagreed as to the defendants' guilt [R. 47] and the second result, conviction, was the subject matter of the editorial in question. The Times considered that these men were in the same general class with Dave Beck, the "virtual political and industrial dictator of the Puget Sound territory" [R. 48]; that lack of official firmness had placed Seattle helplessly under his thumb [R. 48]; that strong methods had saved Portland from like disaster [R. 49]; that success of Dave Beck or of sit-strikers in the Los Angeles territory would be destructive of the Times' cardinal tenet, the open shop. And so, although the courts were quite consistently doing their duty in the premises [R. 50-51], the Times considered it appropriate to speak on behalf of the community and to do everything in its power with vigor and determination to resist "attempts to establish *within its sphere of influence* conditions inimical to that policy" of open shop [R. 44]. Desired ends, contumacious or otherwise, may be attained by commendation and flattery as well as criticism and threats. Lest there be any mishap in this case, which was nearing a successful conclusion as to the "ringleaders" and twenty others [R. 47], the Times undertook to voice its sentiments, as those of the community, so that Judge Ambrose, as well as the enforcement officers, would be left in no doubt concerning its opinion of what the ultimate disposition should be.

The editorial [R. 11] points to the assumed importance of the verdict by initially asserting that it "will have reverberations up and down the Pacific Coast and in points further East," thus conveying to the judicial mind the wisdom of proceeding cautiously. The jury's verdict is said to be the reflection of an "aroused" city and a notice "that no kind of union terrorism will be permitted here";

but what will be the temper of this aroused citizenry if the verdict should be set aside and a broad avenue thus opened for sit-down strikes, "Davebeckism" and other forms of "union terrorism,"—in other words, if the labor elements are thus permitted "to establish within its (the Times) sphere of influence conditions inimical to that policy" so ardently advocated by the Times? And what would be the temper of the Times and the community it assumes to represent should the judge grant probation or impose nominal fines as for misdemeanors and thus vacillate upon an issue so dear to the heart of the Times? Would these questions not immediately suggest themselves to the judicial mind upon reading this editorial? If not, certainly they would as the reading progressed and as the two final paragraphs were reached.

The Secretary of Labor was then defending the sit-strike [R. 47] and many persons honestly believed in it as a lawful weapon of industrial warfare; the matter was open until this court decided *National Labor R. Bd. v. Fansteel Met. Corp.* on February 27, 1939 (306 U. S. 240). But the Times undertook on December 21, 1937, to tell the judge in the *Busick* case that the sit-strike was an "assault on the Douglas plant" and was "union terrorism and racketeering" and "union lawlessness." The district attorney's appraisal of the verdict as one of the "most far-reaching verdicts in the history of this country" is asserted to be correct because, as the Times says, "for the first time since the present cycle of labor disturbances began, union lawlessness has been treated as exactly what it is, an offense against the public peace punishable like any other crime." The jury has now done its duty; it has established a landmark in a new field of law, one of such importance that the judge who would overthrow it might

well deem himself to be bringing down upon his head the wrath of an "aroused" citizenry as well as repeated objurgations and ultimate political opposition of the Los Angeles Times.

> "Government may have broken down in other localities; whole States may have yielded to anarchy. But Los Angeles county stands firm; it has officers *who can do their duty* and *courts* and juries *which can function.*
>
> "*So long as that is the case,* davebeckism cannot and will not get control here; nor johnlewisism either."

Here is commendation indeed for the judge who has guided the jury's deliberations to a proper conclusion. And here in no uncertain terms is a warning to that same judge of what will be the general reaction, and more particularly the Los Angeles Times' reaction, to any orders setting aside the verdict, granting probation to defendants or otherwise failing to follow with firmness and vigor the conviction so justly reached by the jury's wise deliberations.

Judge Wilson said:

> "The language of the editorial as a whole was a suggestion to the court that no leniency be shown to the defendants. What would be expected, after reading the article, except condemnation of the judge if he deemed it legally necessary to grant a new trial or if he granted probation?" [R. 111.]

And the Supreme Court:

> "It cannot reasonably be said that they would have no tendency to influence the trial judge in rendering the

judgment, or in ruling upon the other matters that in the regular order of the proceedings in criminal matters would come before him in the case then pending. The editorial may not have been intended, but it is capable of being construed, as a notice to the trial judge that no leniency should be extended to the convicted men, and, furthermore, that should the court act contrary to the suggestions contained in the editorial, it might well expect adverse criticism in the columns of The Times. Viewing the editorial in the light of these considerations, we are satisfied that its reasonable tendency was to interfere with the ordinary administration of justice by the court in the action then pending before it." [R. 128.]

These conclusions of the triers of the facts form a strange background for Mr. Hanson's assertion that this particular editorial "represents an irreducible minimum of the kind of comment without which a newspaper cannot perform its function as a molder of community opinion" (p. 8).

Petitioners' Attempted Defense of This Editorial.

In defense of this editorial petitioners rely upon the fact that the publication was made after verdict. But the Supreme Court authoritatively ruled[1] [R. 125] that the cause was still pending [see also Judge Wilson's holding at R. 109].

Petitioners likewise advance this argument:

"The attitude of the Times toward the open shop and its inflexible opposition to the closed shop and

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[1] *Minnesota ex rel. Pearson v. Probate Court*, 84 L. Ed. (Adv. Op.) at 479.

> the sit-down strike was well known, and this editorial was but a reiteration of its frequently announced views on such matters [R. 43-48]." (Petn. p. 11.)

The inference is that the judge already knew these things and hence "the opinion appeared where all could know the attitude of the paper" (p. 17),—this "molder of community opinion" (Hanson, p. 8).

Judge Wilson aptly said in connection with the probation editorial:

> "It is of no consequence that this editorial, as argued by counsel for respondents, merely expressed the attitude which the Los Angeles Times had maintained for more than fifty years toward those who committed violence during labor disputes. Even if such attitude had been well known in this community for the period mentioned that fact did not excuse the language addressed directly to the judge telling him in few but expressive words how he should deal with the convicted defendants." [R. 116.]

"Probation for Gorillas".

Matthew Shannon and Kennan Holmes were convicted of assault with a deadly weapon and conspiracy to commit that crime. This was on April 22, 1938; defendants then made application for probation, which on May 2, 1938, was set for hearing on June 7, 1938, said date being also the time fixed for sentencing defendants [R. 23]. The editorial [R. 23] was published on May 5, 1938.

The judge in charge of the sentencing of the sit-strikers had been rather lenient; not one of them had gone to jail, much less the penitentiary [Chandler affidavit, R. 47]. The Times determined that this thing should not happen

again, nor anything resembling it. So the editorial director instructed his assistant to prepare an editorial on the subject.

> "I told him in substance and effect that I did not believe probation should be granted and I thought we should vigorously oppose it." [R. 72-3.]

Harry Chandler described it as "an editorial vigorously opposing the granting of probation," and further said:

> "In this editorial it said in effect that, in the interests of society and of community safety, men who co[illegible] terrorism, particularly when for pay, should be severely punished." [R. 52.]

The Times here indulged in its inimitable free style of comment. The defendants were characterized as members of a "wrecking crew" or "goon squad," as "gorillas," "sluggers for pay," committing "mayhem for wages," each of whom "hires out his muscles * * * in aid of a racket," "a deliberate foe of organized society," "thugs" [R. 23].

> "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument" (Cantwell v. State of Conn., No. 632, decided May 20, 1940).

The editorial not only calls for severe punishment, it in effect specifies the kind and quantum, namely, an indeterminate assignment to the jute mill at San Quentin [R. 24]. It will be noted that the count charging assault with a deadly weapon involves the exercise of judicial discretion as to whether the punishment shall be that of penitentiary

for not over ten years or of county jail not exceeding one year, or merely a fine, or a fine and imprisonment (Pen. C., Sec. 245); while the conspiracy count connotes an exercise of the discretion mentioned in sections 182 and 17 as to whether the conspiracy be treated as a felony or misdemeanor. The Times demands that both be treated as felonies with San Quentin as the place of imprisonment, and hence we have involved not only an address to the judge concerning probation, but also one concerning the quantum of punishment to be administered upon denial of probation.

Again, the time set for sentencing being the time for motion for new trial, the court would then be called upon to determine whether it should be granted upon either count; and the fact that defendants not only made such motion but believed themselves entitled to it, is evidenced by the opinion in *People v. Shannon*, 28 Cal. App. (2d) 677, which shows that an appeal was taken from the order denying a new trial. We have an editorial designed to coerce judicial action in the matter of passing on motion for new trial, denying probation, sentencing defendants as felons and, of course, determining whether the sentences should run concurrently or consecutively. All these things are embraced within the instant editorial and the point was emphasized by the Supreme Court at R. 133.

Lest there be any doubt in the matter, the trial judge is addressed by name, and it so happens that he had never before been *elected* to the Superior Court and would be required, if desirous of continuing in office, to submit to the will of the electorate in the approaching August primary, an electorate consisting of some 1,250,000 voters. (Popular conception is that they can best be reached through favorable newspaper publicity.) He is warned

against making "a serious mistake" and is advised that the "community needs the example of their assignment to the jute mill." Any one situated as he was, knowing of the fixed policy of the Times in labor matters, of its "vigor and determination" in opposing all opposition to the "open shop" policy, and, noting the intemperate language of the editorial, could not well escape the inference that unfavorable action on his part would meet with some sort of retribution, probably political, at the hands of the Times.

Nothing less than a startling newspaper solidarity—a slogan of one for all and all for one—could have produced Mr. Hanson's claim that this "editorial is a proper exercise of the function of the press * * *." This is the editorial which Mr. Cosgrove practically admitted to be contemptuous [R. 87] and on which the Times made "no serious defense" in the Supreme Court, because "little * * * can be said in defense of the publication" [R. 131]

Petitioners' Attempted Defense.

Petitioners' brief (p. 12) attempts to justify this editorial upon the ground of custom. But the claimed custom is shown by R. 52 and by the Yoakum affidavit [R. 53-55] to be one of furnishing facts and opinions to the probation officers, not to the judges themselves; the probation department is required to make an investigation and report the facts, together with its own recommendations as to granting or denying probation (Pen. C., Sec. 1203); but it is not required nor expected to submit the opinions of other persons; this will be apparent from our later discussion of the statutory provisions. But if the custom were that suggested by petitioner, it would be a custom to commit contempt and no such "custom" could justify any particular offense.

The statutes plainly forbid extra-mural expression to the judge of opinions upon the granting or denying of probation. As we have said, the investigation and report is to be made by the probation officer (Pen. C., Sec. 1203). That section shows that his investigation relates to matters to be considered "either in aggravation or mitigation of punishment." Section 1204, relating to facts in mitigation, says:

> "The circumstances must be presented by the testimony of w....esses examined in open court * * *. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section."—

which is a reference back to section 1203. Section 166, subd. 8, enumerates, as one of the "kinds" of *contempts* which constitute a misdemeanor, this very type of activity:

> "8. Presenting to any court having power to pass sentence upon any prisoner under conviction, or to any member of such court, any affidavit or testimony or representation of any kind, verbal or written, in aggravation or mitigation of the punishment to be imposed upon such prisoner, except as provided in this code."

This matter was authoritatively settled adversely to petitioners' contention by the Supreme Court decision [R. 132]; even if certiorari were granted, this construction of the state statute would be accepted as conclusive.[1]

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[1] *Minnesota ex rel. Pearson v. Probate Court*, 84 L. Ed. (Adv. Op.) at 479.

Petitioners' attempt (p. 12) to rely upon a casual remark of an unnamed presiding judge meets with adequate treatment in the Supreme Court opinion at R. 132. The court said in part:

> "If this advice could be construed as permitting the publication of an editorial like that entitled, 'Probation for Gorillas?' then the same right should be accorded to those newspapers favoring the probation of these same defendants referred to in the editorial. We would then have the deplorable situation of a heated newspaper controversy being carried on in the community while the question of probation was before the court for determination. That such a situation would contribute to the orderly administration of justice, we think no one would contend." [R. 132.]

The Fall of an Ex-Queen.

Erwin P. Werner and Helen M. Werner were tried on two charges,—attempt to commit grand theft, a felony (Pen. C., Secs. 484, 487, 489, 664), and violation of Penal Code section 653f, soliciting another to offer or join in an offer of a bribe, which last mentioned offense is punishable by imprisonment in the county jail for not over one year or in the State Penitentiary for not over five years, or by fine of not over $5,000.00. They were convicted on both counts on April 12, 1938, and gave immediate notice of motion for new trial; the hearing of said motion and the matter of sentencing said defendants were set for April 22, 1938 [R. 17]. On that date the court, through Judge Ambrose, would be required to exercise discretion in the following respects: (a) passing upon motion for new trial, which would of course involve determination of sufficiency of the evidence, of the exist-

ence and magnitude of errors, and of whether defendants were properly charged with two offenses rather than one, concerning which last mentioned matter see reversal in *People v. Werner*, 29 Cal. App. (2d) 126; (b) ruling upon application for probation; (c) determining the nature and amount of punishment for the conviction under section 653f; and (d) adjudging that the sentences upon the two counts be made to run consecutively or concurrently.

The editorial "The Fall of An Ex-Queen" [R. 17] was published on April 14th, while all these matters were pending and undecided. The Times having taken to itself the function of speaking for the community in labor matters, now undertakes to perform that function in other types of pending litigation. There was only one man who could properly make the decision and that was the trial judge, who, as shown by the above quotation from the Werner record, referred to newspaper articles in the course of his judicial deliberations. Quite obviously, therefore, the anvil was being hammered for his benefit in order that he might do justice according to the views of the Los Angeles Times.

To that end the Times indulged in a dissertation upon the merits of the Werner convictions with particular reference to its justice in the case of the wife [R. 17]. "An address to the public is an address to the court," says Judge Wilson [R. 101].

Politics, it is said, is not only an essentially selfish business but it is conducted "in the main for personal profit of one kind or another" and "When it is of the boss type, it is apt to be pretty sordid as well." For years Mrs. Werner was "the country's only woman boss." And "Success in boss-ship * * * necessarily implies a

kind of moral obliquity if not an actually illegal one." These remarks, applied to Mrs. Werner who is about to move for a new trial or other favorable judicial action, picture her as a pretty sordid figure who has received her just reward. If there be any question about that, the second paragraph of the editorial makes it clear:

> "So that it is something of a *contradiction of sense*, if not of terms, to express regret that the political talents of Mrs. Helen Werner were not directed to other objectives than those which, in the twilight of her active life, have brought her and her husband to disgrace."

In other words, we may say that we are sorry that these things have happened to her, but one cannot truly be so, because Mrs. Werner is possessed of such moral obliquity that it is well that she has devoted herself to sordid activities; she would not have been of use elsewhere, nor would she have succeeded; indeed, with her mental outlook, she would have been more a detriment to the public in other lines of activity. We again quote:

> "If they (her talents) had been, she would not have been in politics at all and probably would never have been heard of in a public way. Her natural flair was purely political; she would have been miscast in any other sphere of activity."

The woman who has just been convicted, who will apply for a new trial, who must be sentenced, who may possibly apply for or be granted probation, is a sordid woman possessed of moral obliquity, whose talents were directed toward personal profit to the inevitable detriment of the

public. To prove that she is sordid, we need but point to the fact that:

> "In her heyday she had a finger in every political pie and many were the *plums* she was able to extract therefrom for those *who played ball with her.* From small beginnings she utilized every opportunity to extend her influence and to put officeholders and promising political material under obligations to her."

Then came the inevitable turn of the political wheel, she found her grip slipping and it was hard to take, as a result of which:

> "The several cases which in recent years have brought her before the courts to defend her activities seem all examples of an energetic effort to regain and reassert her onetime influence in high places."

Judge Wilson could judicially notice the fact, which all the public knew, that Mrs. Werner had not been convicted in a single one of "the several cases" to which reference is here made; but they are referred to as examples of the thing which ultimately led to her conviction in the case in which she was about to move for a new trial; the plain implication is that she was guilty in those other cases and that the instant case is but one of a number of like examples "of an energetic effort to regain and reassert her onetime influence in high places." That this is the meaning is apparent from the sentence which immediately follows: "That it should ultimately have landed her behind the bars as a convicted bribe-seeker is not illogical." In other words, the conviction of this sordid political figure, dealing constantly in political plums, and grasping for

more of the same sort of personal profit as her sun is sinking, is not only guilty of the charges upon which convicted, but also guilty of the other charges on which formerly tried; that they are all of one piece, and the logic of the situation is that sooner or later her guilt should have been proved on her as in the instant case.

Counsel for petitioners assert that:

> "The language was 'temperate and considerate' and 'free of any abusive or immoderate language' * * * nor did it contain any suggestion respecting court proceedings." (p. 12.)

But the Supreme Court said:

> "With this knowledge before them, they prepared and published the editorial which it must be conceded was a *scathing denunciation* of Mrs. Werner and a *caustic criticism* of her political activities in recent years. That a publication of this character concerning a person convicted by the verdict of a jury, and who was soon to appear for sentence, would have a disturbing effect upon the judge before whom the case was pending when the time came for pronouncing judgment, we think can *neither be questioned nor denied.*" [R. 130.]

The Supreme Court, summarizing its rulings, said of the three editorials:

> "In the present case the detriment caused by the publication of said editorials was the *probable denial of a fair trial* to the litigants in the actions then pending before the courts which were the subject of said editorials." [R. 138.]

II.

The Instant Petition Presents No Federal Question.

What Constitutes Contempt Is a Matter of Local Law.

The California Constitution provides in section 9, Article I:

> "Every citizen may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right;* and no law shall be passed to restrain or abridge the liberty of speech or of the press. * * *"

The California courts found upon the facts presented that there had been *abuses of that right* by petitioners.

The ultimate and essential claim of petitioners is that fundamental rights have been denied them by holdings of two state courts that the facts at bar measure up to the standard of contempt which has been announced, accepted and applied as the state law for many years past,[1]—a criterion which corresponds to the one heretofore adopted by this court.[2] And petitioners would have this court first reverse itself and then hold that the state court had denied due process or equal protection of the laws[3] because it

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[1]*In re San Francisco Chronicle*, 1 Cal. (2d) 630, 637; *In re Shuler*, 210 Cal. 377, 402; *In re Lindsley*, 75 Cal. App. 122, 124; *Lindsley v. Superior Court*, 76 Cal. App. 419, 428.

[2]*Toledo Newspaper Co. v. U. S.*, 247 U. S. 402, 421; *Near v. State of Minnesota*, 283 U. S. 697, 715; *Sinclair v. U. S.*, 279 U. S. 749, 764.

[3]It is the Fourteenth Amendment, not the First, that affords protection against state denial of freedom of the press or freedom of speech. *Near v. Minnesota*, 283 U. S. 697, 707.

applied the standard of guilt which has prevailed in the California courts and in the United States tribunals since the formation of the state and federal governments, respectively.

This contention, for several reasons, presents no federal question of any substantiality. In the first place it ignores the sovereign power of the state and the restricted nature of the grant of powers to the United States. It is well settled that each state may set up its own body of jurisprudence, whether it be the civil law, the common law, or a hybrid form such as is exemplified by the community property system in the common law state of California.[1] In *Erie R. Co. v. Tompkins*, 304 U. S. 64, 78, this court recently said:

> "And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

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[1]See *Missouri v. Lewis*, 101 U. S. 22, 31; dissent of Mr. Justice Brandeis in *Truax v. Corrigan*, 257 U. S. at 372-74.

And, quoting Mr. Justice Holmes:

> " 'The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. * * *
>
> " '* * * the authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.' "

The state may define crimes or lawful conduct as it sees fit.[1]

The powers of its own courts are within its exclusive keeping, not subject to federal control.[2]

The substantive law of the state is binding upon this court in all types of cases, subject only to the narrow exception of "matters governed by the federal Constitution or by acts of Congress."[3]

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[1]See *Sheedin-Carpenter Co. v. Minnesota*, 218 U. S. 57, 67-69; *Powell v. Pennsylvania*, 127 U. S. 678.

[2]*Missouri v. Lewis*, 101 U. S. 22; *Cincinnati Street Railway Co. v. Snell*, 193 U. S. 30, 36; *Tumey v. State of Ohio*, 273 U. S. 510, 534; *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511, 517; *Truax v. Corrigan*, 257 U. S. at 373-4, dissenting opinion.

[3]*Erie R. Co. v. Tompkins*, 304 U. S. at 78.

Application of Fourteenth Amendment to Contempt.

For the purposes of this case, the only limitation upon the foregoing propositions is the requirement that due process of law or equal protection of the laws must not be denied. But "the 14th amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions * * * any more than, in guaranteeing due process, it assures immunity from judicial error * * *." (*Milwaukee, etc. Co. v. Wisconsin ex rel. Milwaukee*, 252 U. S. at 106.)[1]

To determine what is due process in contempt proceedings we must look, of course, to the standards which were recognized at the time of adoption of the federal Constitution.[2] Such investigation discloses that, as the power is an inherent one, necessary to the independence of each court,[3] *the demands of due process are met by adequate notice of hearing and opportunity to be heard*,[4] both of which requisites were manifestly present here.

Two years of litigation with extensive argument and reargument upon the law, trial had upon issues carefully drawn and upon oral evidence taken in open court, with favorable rulings of the trial court upon two counts out of

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[1]See, also, *Riley v. Worcester County Trust Co.*, 89 Fed. (2d) 59, 66.

[2]*Eilenbecker v. District Court*, 134 U. S. 31, 38; *Tumey v. State of Ohio*, 273 U. S. at 523.

[3]*Michaelson v. U. S.*, 266 U. S. 42, 65; *Myers v. U. S.*, 264 U. S. 95, 103; *Ex parte Robinson*, 86 U. S. 505, 510.

[4]*Cooke v. U. S.*, 267 U. S. 517, 537; *Blackmer v. U. S.*, 284 U. S. 421, 440; *Eilenbecker v. District Court*, 134 U. S. 31, 39; *Ex parte Savin*, 131 U. S. 267, 278; *U. S. v. Moore*, 287 Fed. 879, 883, certiorari denied in 264 U. S. 581.

seven and like rulings by the Supreme Court upon two additional counts, would seem to fill the prescribed measure to the brim.

Even if it were to be conceded that there was error in the application of the state law to the facts at bar, that would not raise a constitutional question for, as said in the *Milwaukee* case, *supra*, the 14th Amendment does not "assure uniformity of judicial decisions" or "immunity from judicial error."

Bell Telephone Co. v. Pennsylvania P. U. Commission, 84 L. Ed. (Adv. Op.) 412:

> "In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of the state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a federal question."

Patterson v. Colorado Is Controlling.

The question now presented—whether a finding of contempt of the state court presents a federal question—was specifically decided by this court in *Patterson v. Colorado*, 205 U. S. 454. That case dealt with a contempt by publication in a newspaper. A writ of error to review the conviction in the state court was dismissed for want of jurisdiction, this court speaking through Mr. Justice Holmes. The decision proceeded upon the postulate that

"The only question for this court is the power of the state" (p. 460); and the court said in part:

> "There is no constitutional right to have all general propositions of law once adopted remain unchanged. * * * in general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the 14th Amendment merely because it is wrong or because earlier decisions are reversed.
>
> "It is argued that the articles did not constitute a contempt. * * * However, it is enough for us to say that they are far from showing that innocent conduct has been laid hold of *as an arbitrary pretense for an arbitrary punishment*. Supposing that such a case would give the plaintiff in error a standing here, *anything short of that is for the state court to decide. What constitutes contempt*, as well as the time during which it may be committed, *is a matter of local law*."

Again at page 463:

> "It only remains to add that the plaintiff in error had his day in court and opportunity to be heard. We have scrutinized the case, but cannot say that it shows an infraction of rights under the Constitution of the United States, or discloses more than the formal appeal to that instrument in the answer to found the jurisdiction of this court."

To the same effect see:

Newport Light Co. v. City of Newport, 151 U. S. 527;

Owen v. Dancy, 36 Fed. (2d) 882, 884;

Gasquet v. Lapeyre, 242 U. S. 367, 369.

Finality of Contempt Judgment Is Essential to Independence of Contemned Court.

And the *Patterson* decision is obviously sound for a certiorari would first review the findings of the state courts upon questions of fact and state law and, if decided favorably to petitioner, would impose upon them the judgment of this tribunal as to what constitutes contempt of the courts created by and functioning under the laws of the sovereign state of California,—thus impairing their inherent power and duty of self-protection.

Ex parte Kearney, 7 Wheat. 38, 44:

> "The sole adjudication of contempt, and the punishment thereof, belongs exclusively, and without interfering to each respective court. Infinite confusion and disorder would follow if courts could, by writs of habeas corpus, examine and determine the contempt of others."

Ex parte Fisk, 113 U. S. 713, 718:

> "There can be no doubt of the proposition, that the exercise of the power of punishment for contempt of their orders, by courts of general jurisdiction, is not subject to review by writ of error, or appeal to this court. Nor is there, in the system of federal jurisprudence, any relief against such orders, when the court has authority to make them, except through the court making the order, or possibly by the exercise of the pardoning power.

"This principle has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary exercise of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors."

Re Debs, 158 U. S. 564, 595:

"And this is no technical rule. In order that a court may compel obedience to its orders, it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

And this is the law in California. An adjudication of contempt is reviewable in an appellate court only to the extent of determining whether the evidence supporting the judgment is sufficiently substantial to sustain the jurisdictional finding [see R. 134].

Whether the Superior Court of Los Angeles County and the Supreme Court of California have misapplied the law to the facts is not for this court to say, for that is not a federal question.

III.

The "Clear and Present Danger" Doctrine Is Not Applicable to Contempt.

Even if this court could properly review the intrinsic merit of the state law of contempt and, through reversing itself, impose a new law upon the state of California, there would be no good ground for so doing.

There Is a Manifest Distinction Between Abridging Free Speech and Punishing Its Abuse.

The cases upon which petitioners rely[1] are in no instance concerned with contempt of court. They deal with statutory *abridgments* of free speech, not with subsequent punishments for *abuses* of that right, such as the recognized instances of libel, slander and contempt.

The basic conception that "Liberty of speech and of the press is also not an absolute right, and the state may punish its abuse,"[2] is implicit in all of the "clear and present danger" pronouncements.

See:

Gitlow v. New York, 268 U. S. at 666;

Whitney v. California, 274 U. S. at 373 (concurring opinion of Mr. Justice Brandeis);

Schenck v. United States, 249 U. S. at 52 (Mr. Justice Holmes);

Cantwell v. State of Connecticut (No. 632, decided May 20, 1940).

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[1]*Whitney v. California*, 274 U. S. 357; *Herndon v. Lowry*, 301 U. S. 242; *Lovell v. Griffin*, 303 U. S. 444; *Schneider v. New Jersey*, 308 U. S. 147; *Thornhill v. Alabama*, 84 L. Ed. (Adv. Op.) 659; *Carlson v. California*, 84 L. Ed. (Adv. Op.) 671; *Grosjean v. Amer. Press Co.*, 297 U. S. 233.

[2]*Near v. State of Minnesota*, 238 U. S. at 708.

The Clear and Present Danger Doctrine Was Not Designed for Application to Contempt.

Petitioners make no claim that the doctrine now advocated has been applied by this court to contempt proceedings. And it is significant that the justices who evolved and insisted upon its application to abridgements of free expression of political or economic views (the field delimited for such free discussion by the recent *Thornhill* case) made no attempt to extend the doctrine to contempt proceedings but actually joined in decisions which, by adopting the reasonable tendency standard, operated to exclude it.

Toledo Newspaper Co. v. United States, 247 U. S. 402, was decided in 1918, and, in the face of a dissent by Mr. Justice Holmes and Mr. Justice Brandeis, it adopted and applied the reasonable tendency test. The dissenting justices made no attempt to inject the clear and present danger doctrine, and contented themselves with a discussion of the proper construction of the pertinent federal statute. This new doctrine was first brought forward in the *Schenck* case (249 U. S. 52) decided at the next term. Although one or both of these justices pressed the doctrine for application in the *Abrams*, *Gitlow* and *Whitney* cases (decided in 1919, 1925, and 1927, respectively), they concurred in the unanimous decision of *Sinclair v. United States*, 279 U. S. 749 (decided in 1929), which again reiterated and applied to a contempt proceeding the *Toledo Newspaper Co.* rule that "the situation is controlled by the reasonable tendencies of the acts done and not by

extreme and substantially impossible assumptions on the subject," which rule is again phrased at page 764 as follows:

> "But here again not the influence upon the mind of the particular judge is the criterion, but *the reasonable tendency of the acts done to influence* or bring about the baleful result is the test. In other words, having regard to the powers conferred, to the protection of society, to the honest and fair administration of justice and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case."

This doctrine was adopted at the instance of Mr. Justice Roberts, who then appeared as counsel for the United States and successfully urged the affirmance of the conviction, relying largely upon the *Toledo Newspaper Company* case.

Moreover, Mr. Justice Roberts, who spoke for the court in applying the clear and present danger rule in *Herndon v. Lowry*, delivered at the same term the opinion in *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 131-133, wherein he rejected the contention that the National Labor Relations Act as applied to the Associated Press was in restraint of freedom of the press, and used the language which we have quoted, *supra*. In support of that statement there is cited only the case of *Toledo Newspaper Co. v. United States*. And Mr. Chief Justice Hughes, Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo joined in forming a majority of the court in that instance.

The True Purport of the Doctrine.

The clear and present danger doctrine, as stated from time to time, has called for an imminent danger of overthrow of organized government. See, for instance, Mr. Justice Holmes' dissent in the *Abrams* case, 250 U. S. at 630; the concurrence of Mr. Justice Holmes and Mr. Justice Brandeis in *Gitlow v. New York*, 268 U. S. at 673. If the doctrine were applied in this extreme sense to contempt proceedings it would result absurdly, for successful influence of one judge or two judges or a dozen judges would have no direct and immediate tendency to destroy the government as a whole. Judge Wilson well said:

> "The application of this doctrine to contempt proceedings would mean that an unsuccessful attempt to influence the court would not be punishable, that only the one who prevailed in his effort would be in contempt. It would also mean that one contempt, or possibly two or more, would of necessity be passed by as unimportant, that the court could act only after so many contempts had been committed that the courts and the government would have been undermined, by which time there would have been so great a popular uprising as to change the form of government, whereupon there would be no courts and therefore no contempt." [R. 106.]

The Doctrine, as Advanced by Petitioners, Is Not Essentially Different From the Reasonable Tendency Rule.

Petitioners do not rely upon the extreme statement of the doctrine. They rest upon Mr. Justice Brandeis' statement in the *Whitney* case:

> "That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent

> danger of some substantive evil which the state constitutionally may seek to prevent has been settled." (Petitioners' Br. p. 17.)

And petitioners' brief shows that the doctrine as applied to contempt distills itself into the same thing as the reasonable tendency doctrine against which counsel for petitioners inveigh.

Under this statement of the rule there is necessary to lawful restraint of speech only "a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent." And petitioners (at p. 18) concede that "danger to the orderly administration of justice," if clear and imminent, would measure up to the standard which they advocate. The *Toledo* case holds in no uncertain terms that publications tending to influence the court in pending matters do endanger, do in fact obstruct, the orderly administration of justice; and interference with that orderly administration is, in petitioners' own conception of the matter, an evil against which the state, through its courts, may protect itself.

Mr. Wirin, *amicus curiae* herein, who represented Harry Bridges upon his application, No. 759, said in that petition (pp. 14-15), that "the courts have the authority and the obligation to safeguard themselves from * * * outside influences concerning pending cases"; and that "interferences with the judiciary admittedly constitute 'substantive evils which the courts may constitutionally penalize." Clearly, then (according to the Wirin argument), protection against "outside influences concerning pending cases" is the thing against which the state, through its courts, may protect itself whenever there appears "a clear and imminent danger" of such influences

being brought to bear upon such pending cases. If this were not so, "We would then have the deplorable situation of a heated newspaper controversy being carried on in the community while the question * * * was before the court for determination. That such a situation would contribute to the orderly administration of justice, we think no one would contend" [Supreme Ct., R. 132].

It is also interesting to note that the *amicus curiae* brief of American Civil Liberties Union in the *Bridges* case suggests that the appropriate criterion is "a *reasonable apprehension* that the independence of the judiciary was being challenged by the comment complained of" (p 4) and that "it should be necessary to find a *strong probability* that interference would result from the act charged before punishment is meted out" (p. 4). Commenting upon *Craig v. Hecht,* 263 U. S. 255, it is further said, in effect, at page 6, that the court there recognized the impropriety of comment upon pending cases "when it is quite clear that the comment has a *direct tendency* to obstruct."

All counsel who advocate the danger doctrine find difficulty in formulating it so as to exclude "tendency to influence" as the essential element.

Either Doctrine Presents a Mere Question of Fact.

We have then a question of fact as to whether "a clear and imminent danger" of influencing the court exists, as opposed to a question of fact whether the extraneous influence has a "reasonable tendency" to effect that result.

The court said in *Schaefer v. United States,* 251 U. S. at 474: "Free speech is not an absolute right, and when it or any right becomes wrong by excess is somewhat

elusive of definition." Mr. Justice Holmes said in the *Schenck* case: "It is a question of proximity and degree." The court there held that the evidence was sufficient to justify the lower federal court in finding that the defendant's act did create "a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent" and, in so doing, stressed the "tendency" of the documents in question to influence others to obstruct the recruiting service of the army. (See pp. 51-2.)

Mr. Justice Brandeis, in the *Whitney* case (Mr. Justice Holmes concurring), advocated the application of the clear and present danger doctrine, and said (274 U. S. at 374):

> "This court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection."

Mr. Justice Brandeis, in a separate opinion in the *Schaefer* case (251 U. S. at 482), said:

> "Like many other rules for human conduct, it can be applied correctly only by the exercise of good judgment; and to the exercise of good judgment, calmness is, in times of deep feeling and on subjects which excite passion, as essential as fearlessness and honesty. The question whether, in a particular instance, the words spoken or written fall within the permissible curtailment of free speech, is, under the rule enunciated by this court, one of degree. And because it is a question of degree, the field in which the jury may exercise its judgment is, necessarily, a

wide one. But its field is not unlimited. The trial provided for is one by judge *and* jury; and the judge may not abdicate his function. If the words were of such a nature and were used under such circumstances that men, judging in calmness, could not reasonably say that they created a clear and present danger that they would bring about the evil which Congress sought and had a right to prevent, then it is the duty of the trial judge to withdraw the case from the consideration of the jury; and if he fails to do so, it is the duty of the appellate court to correct the error." (Italics by the court.)

As the same justice pointed out in the *Whitney* case, there is no fixed standard for determination of the existence of "a clear and imminent danger" and the matter must be determined as one of fact in the trial court. In that instance the concurring justices held that, notwithstanding the erroneous reasoning of the trial judge, his ultimate finding was sustained by competent evidence and, hence, should be affirmed. At pages 378-9 it was said:

> "Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature."

And:

> "On the other hand, there was evidence on which the court or jury might have found that such danger existed. * * * In the present case, however, there was other testimony which *tended* to establish

> the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes; and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances the judgment of the state court cannot be disturbed."

Whether we apply the test of reasonable tendency to interfere with judicial proceedings or clear and imminent danger of interference therewith, we have a question of fact presented in each contempt proceeding, and it is competent for the court to conclude that a publication which has the specified tendency also presents clear and imminent danger "of some substantive evil which the state constitutionally may seek to prevent". As applied to contempt, petitioners' clear and present danger doctrine possesses nothing of substance different from the criterion laid down in the *Toledo Newspaper* case, the *Sinclair* case, and in the State of California.[1]

The meaning of each editorial at bar presents only a question of fact whose final solution rests with the trial judge if the inferences drawn by him are reasonable.[2]

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[1]*In re Shuler*, 210 Cal. 377, 402; *In re San Francisco Chronicle*, 1 Cal. (2d) 630, 637.

[2]*In re Hallinan*, 126 Cal. App. 121; *Lindsley v. Superior Court*, 76 Cal. App. 419, 430; *Rose v. Superior Court*, 140 Cal. App. 418, 424; *Daily v. Superior Court*, 4 Cal. App. (2d) 127, 134; *In re Reilly*, 17 Cal. App. (2d) 55, 60.

And it was so held below [R. 134]. The Supreme Court sustained Judge Wilson's factual deductions, and it seems impossible to arrive at the conclusion that this was not the exercise of calm, reasonable and good judgment, the test suggested by the *Schaefer* case.

The existence of imminent danger "to the orderly administration of justice" is inherent in the findings of Judge Wilson [R. 60] and of the Supreme Court concerning each of the three editorials. As to the "Sit-Strikers Convicted", see R. 109-111, 127-128; as to "The Fall of an Ex-Queen", see R. 112-113, 130; and "Probation for Gorillas?", R. 115-116, 131-134.

Herndon v. Lowry Does Not Support Petitioners' Position.

The claim that the reasonable tendency doctrine was rejected by *Herndon v. Lowry*[1] as too vague a criterion of guilt is not well founded. What was there said related to an argument of counsel that "reasonable tendency" should be read into the vague statute under consideration, which had been so construed by the state court as to set at large the objective of the "dangerous tendency" suggested by counsel. At page 256 the court stressed the fact that "The legislation under review differs radically from the espionage acts in that it does not deal with a wilful attempt to obstruct a described and defined activity of the government." In view of the state court's construction of the statute it further said, at page 261:

> "The Act does not prohibit incitement to violent interference with any given activity or operation of the state. By force of it, as construed, the judge and jury trying an alleged offender cannot appraise the

[1]301 U. S. 242.

circumstances and character of the defendant's utterances or activities as begetting a clear and present danger of forcible obstruction of a particular state function. Nor is any specified conduct or utterance of the accused made an offense."[1]

Reasonable Tendency Is a Common Law Standard, Not a Newly Created Criterion of Guilt.

More important, however, is the fact that the court was discussing legislation which provided a new measure of guilt and not one which incorporated a recognized common law standard of conduct. The decision differentiates such cases as *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, and *Nash v. U. S.*, 229 U. S. 373, saying:

> "The decisions relied on by the state held the Sherman law furnished a reasonable standard of guilt because it made a standard long recognized by the common law the statutory test." (page 263.)

And reliance was placed upon *U. S. v. L. Cohen Grocery Co.*, 255 U. S. 81, wherein the court, at page 92, said:

> "Indeed, the distinction between the cases relied upon and those establishing the general principle to which we have referred, and which we now apply and uphold as a matter of reason and authority, is so clearly pointed out in decided cases that we deem it only necessary to cite them."

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[1]As to the true purport of this decision see next to last paragraph of *Cantwell v. State of Connecticut* (No. 632, decided May 20, 1940).

The Cohen decision cited, among others, *International Harvester Co. v. Kentucky*, 234 U. S. 216. Mr. Justice Holmes, speaking for the court in that instance, said, at page 223:

> "We regard this decision as consistent with Nash v. United States, 229 U. S. 373, 377, 57 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780, in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree—what is an undue restraint of trade. That deals with the actual, not with an imaginary condition other than the facts. It goes no further than to recognize that, as with negligence, between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach, and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust. The conditions are as permanent as anything human, and a great body of precedents on the civil side, coupled with familiar practice, make it comparatively easy for common sense to keep to what is safe."

The distinction between new statutory tests and settled common law criteria was again drawn by Mr. Chief Justice Taft in *Cline v. Frink Dairy Co.*, 274 U. S. 445, 459. He said:

> "'The precise point of differentiation in some instances is not easy of statement. But it will be enough for present purposes to say generally that the deci-

sions of the court upholding statutes as sufficiently certain rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them. Hygrade Provision Co. v. Sherman, 266 U. S. 497, 502, 69 L. ed. 402, 407, 45 Sup. Ct. Rep. 141; Omaechevarria v. Idaho, 246 U. S. 343, 348, 62 L. ed. 763, 767, 38 Sup. Ct. Rep. 323, *or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ.* Nash v. United States, 229 U. S. 373, 376, 57 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780; International Harvester Co. v. Kentucky, 234 U. S. 223, 58 L. ed. 1288, 34 Sup. Ct. Rep. 853, or, as broadly stated by Mr. Chief Justice White in United States v. L. Cohen Grocery Co., 255 U. S. 81, 92, 65 L. ed. 516, 522, 14 A. L. R. 1045, 41 Sup. Ct. Rep. 298, "that for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded." ' "

The reasonable tendency test is the ancient common law standard applicable to contempt of court and, to quote the *International Harvester* case, "a great body of precedents on the civil side, coupled with familiar practice, make it comparatively easy for common sense to keep to what is safe." The *Herndon* case, dealing with a statutory definition of guilt, does not support petitioner's contention that reasonable tendency to influence the court is not the proper

test of unlawfulness of utterances concerning pending causes.[1]

And it should not be forgotten that whatever may be the accepted test of guilt, the existence of a clear and present danger is a question of fact just as is the claim of a reasonable tendency to influence the court. The one test is as flexible as the other and the question always one of fact, as recognized in the concurring opinion in the *Whitney* case.

Fox v. Washington, 236 U. S. 273, emphasizes this consideration. It first found the criterion of guilt to be sufficiently definite, and then pointed (a) to the necessity of limiting the review to the case in hand and (b) to the impropriety of embarking upon a general survey of suppositious situations suggested by counsel for petitioners. "If the statute should be construed as going no farther than it is necessary to go in order to bring the defendant within it, there is no trouble with it for want of definiteness." And so at bar, if reasonable inferences from the editorials in question warrant the conclusion that they possessed an inherent tendency to embarrass or disturb the judge in his deliberations or to actually influence his decision, consciously or unconsciously, in a given direction, that situation spells a contempt of court whether we call the test reasonable tendency or clear and present danger. Under these circumstances, both tests come down to the same thing, namely, an unlawful permeating of the judicial chambers with extramural influences.

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[1]See, in this connection, *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 84 L. Ed. (Adv. Op.) 477, 479-480.

The "Actual Obstruction" Principle.

Mr. Wirin, in his *amicus curiae* brief, advocates adoption of the test of "actual obstruction." As the phrase is there used, it seems to connote a communication tending to influence and actually exercising an influence upon the court. This is deducible from the quotations from *State v. American News Company*, 64 S. D. 385,[1] and *Nixon v. State*, 207 Ind. 426.

In this sense it may be said that Mr. Justice Holmes contended for "actual obstruction" in his dissent in the *Toledo Newspaper Company* case, but *only* as applied to the construction of the statute under consideration. For the learned Justice cautioned that, "I am not considering whether there was a technical contempt at common law, but whether what was done falls within the words of an act intended and admitted to limit the power of the courts" (p. 424). He was discussing an act which said that the contempt power of courts should "not be construed to extend to any case except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice." He thought the language of the statute "too plain to be construed away" and that the phrase "so near as to obstruct" meant "so near as actually to obstruct—and not merely near enough to

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[1]See Judge Wilson's discussion of this case at R. 106-7.

threaten a possible obstruction." And because he thought a United States judge should "be a man of ordinary firmness of character," he found it "impossible to believe that such a judge could have found in anything that was printed even a tendency to prevent his performing his sworn duty." But the majority of the court differed with him and held that the publication in the neighborhood of the court of articles *having a reasonable tendency to influence* the deliberations of the judge *constituted an actual obstruction* of the administration of justice; that "The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty" (p. 419). Again at page 421:

> "But here again, not the influence upon the mind of the particular judge is the criterion, but the reasonable tendency of the acts done to influence or bring about the baleful result is the test. In other words, having regard to the powers conferred, to the protection of society, to the honest and fair administration of justice, and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case. The wrongdoer may not be heard to try the power of the judge to resist acts of obstruction and wrongdoing by him committed as a prelude to trial and punishment for his wrongful acts."

That the learned Justice abandoned this viewpoint appears from his discussion of the clear and present danger doctrine in the *Schenck* case,[1] where he said:

> "If the act (speaking, or circulating a paper), its tendency and the intent with which it is done, are the same, we perceive no ground for saying that success alone warrants making the act a crime."

The fact is also evidenced by his concurring in the *Sinclair* opinion,[2] which reiterated the language just quoted from the *Toledo* case.

The distinction between tendency to influence and fact of influence is so evanescent as often to be indiscernible. The California Supreme Court in *In re San Francisco Chronicle*, 1 Cal. (2d) at 637, quoted with approval from *People v. Wilson*, 64 Ill. 195, as follows:

> "'A court will, of course, endeavor to remain wholly uninfluenced by publications like that under consideration, but will the community believe that it is able to do so? *Can it even be certain in regard to itself?* Can men always be sure of their mental poise? A timid man might be influenced to yield, while a combative man would be driven in the opposite direction. Whether the actual influence is on

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[1]249 U. S. at 52.

[2]279 U. S. at 749.

> one side or the other, so far as it is felt at all, it becomes dangerous to the administration of justice. Even if a court is happily composed of judges of such firm and equal temper that they remain wholly uninfluenced in either direction, nevertheless *a disturbing element has been thrown into the council chamber, which it is the wise policy of the law to exclude.'* "

As a practical matter, the fact or extent of actual operation of extraneous influence upon the judicial mind is never susceptible of proof.

Judge Wilson further explained the impossibility of recognizing the "actual obstruction" doctrine when he said at R. 108:

> "If the courts are not permitted to try cases and render judgments impartially and without pressure either from newspapers, individuals, or groups of individuals, freedom of speech and freedom of publication will soon pass into oblivion. If a newspaper may suggest how a case should be determined, any person or group has the same right to suggest its ideas to the judge. Lawsuits would then be decided, not according to the weight of the evidence, but according to the weight of the influence brought to bear upon the judge, and the newspaper itself would be the victim if it had less influence than the opposing group."

See similar remarks of Supreme Court at R. 132.

Conclusion.

We submit, without further elaboration, that this court, if it undertook a review of this case, would find no constitutional question present, for the evidence and the reasonable inferences therefrom abundantly support the findings of fact of the trial court, which were approved by the Supreme Court of California, and which show contempt of court regardless of the particular test applied.

> "To be effective, judicial administration must not be leaden-footed."[1]

It is submitted that no good ground for certiorari has been shown, and that the writ should be denied.

Respectfully submitted,

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[1]*Cobbledick v. U. S.*, 84 L. Ed. (Adv. Op.) at 525.